Joint Management Body of Gurney Park Condominium v Majlis Perbandaran Pulau Pinang

APPEAL BOARD (PULAU PINANG) — APPEAL NO LR/PP/2 OF 2010
YEO YANG POH CH, TEH THEAM SENG AND GANESH PONNIAH
25 APRIL 2012

Evidence — Adverse inference — Evidence Act 1950 s 114(g) — Failure to call witness — Whether conscious withholding or suppression of evidence — Whether adverse inference invoked

Local Government — Town and country planning — Application for planning permission — Procedure — Appeal against granting of amended planning permission — Whether new ground of objection could be raised at hearing — Whether new evidence admissible during hearing of appeal — Proceeding before appeal board first-tier proceeding — Whether principle in Ladd v Marshall applicable — Whether planning authority erred in not requiring Traffic Impact Assessment Report — Whether new evidence admissible during hearing of appeal — Whether adverse inference to be raised against planning authority for not calling witness

The respondent had on 5 December 2006 granted planning permission ('the original KM') for Hunza Properties (Penang) Sdn Bhd ('the KM applicant') to carry out a development of condominiums, commercial lots and office lots. In the course of the development, the KM applicant on 5 January 2009 applied to the respondent for some amendments to the original KM ('the amendment application'). The amendment application was granted by the respondent on 16 December 2009 ('the amended KM'). The difference between the original KM and the amended KM concerned only a small variation of 5% of the combined commercial/office space. The appellant's objections against the amendment application were rejected by the respondent in granting the amended KM and hence this appeal. The appellant's objections were based on several grounds. In addition to this, the appellant also raised concern rather than an objection to the effect that the size of the project would increase traffic congestion, parking issues and further deterioration of the neighbouring roads. In procuring the original KM, the KM applicant had submitted a micro-study Traffic Impact Assessment Report prepared in 2006 ('the 2006 TIA report') and the respondent was satisfied with the assessments made in the 2006 TIA report. When later the amendment application was submitted in 2009, the respondent took the view that, because the proposed changes were

non-substantial, no fresh TIA report was needed. During the hearing, the appellant abandoned all its other grounds of appeal and relied simply on the ground that when considering and approving the amendment application, the respondent was wrong to have relied on the 2006 TIA report since it ought to have asked for an updated TIA report ('the TIAR objection"). The appellant then tendered its TIA Report that was prepared in 2011 ('the appellant's TIA report'). A number of adjournments of the hearing of the appeal were sought by the appellant, who did not display expedition or urgency in the prosecution of its appeal. The appellant also chose not to seek a stay of implementation of the amended KM. The issues which arose to be considered by the board were: (i) whether the TIAR objection was a new ground which could be raised at the hearing; (ii) whether the respondent had erred in not requiring a TIA report for the purpose of consideration of the amendment application; (iii) whether the appellant's TIA report was a piece of new evidence which should not be allowed based on the principle in *Ladd v Marshall* [1954] 3 All ER 745 (*Ladd v Marshall*); (iv) whether the respondent (the local planning authority) bore the burden of proving that its decision was correctly and reasonably made; and (v) whether since the respondent did not itself call any witness, s 114(g) of the Evidence Act 1950 should be invoked against the respondent.

Held, dismissing the appeal and affirming the respondent's decision:

(1) The board is not precluded from receiving and considering, if it thinks fit, a new ground that is raised only at the hearing. But whether or not it will do so depend on the facts and circumstances of each case. The TIAR objection was not raised only on the last day of hearing. It was raised months before that. The respondent and the KM applicant had ample opportunity to answer the TIAR objection. Thus, the new ground (ie the TIAR objection) could be raised by the appellant (see paras 24 & 26).

(2) The respondent had not erred, or had made an unreasonable decision, in not requiring a TIA report when it set out to deliberate and decide whether to grant the amendment application. A TIA report is only required where the application at hand, if approved, will bring about a substantial increase in population or traffic volume in the area concerned. Unlike the application for the original KM which, once approved, would result in a substantial increase in new residential, commercial and office space (and thus a substantial increase in traffic volume), the amendment application concerned only a small variation of 5% of the combined commercial/office space. In the circumstances, it was not wrong for the respondent to have formed the opinion that no TIA report was necessary to support a relatively small alteration. The respondent had not committed any error of the *Wednesbury* kind (see para 37).

(3) No objections were raised during the hearing, when the appellant's TIA report was introduced. Both the respondent and the KM applicant

proceeded to cross examine its makers at length. The principle in *Ladd v Marshall* applies only to a judicial appellate process (as opposed to a judicial proceeding of first instance). Although a proceeding before the board is termed an 'appeal', and the person who initiates or brings about such proceeding is described as an 'appellant', in truth a proceeding before the board is a first-tier judicial or quasi-judicial proceeding. A proceeding before the board is therefore not an 'appeal' in the *Ladd v Marshall* sense of the word (see para 38).

(4) The appellant's TIA report, while not precluded by the principle in *Ladd v Marshall*, bore little or no evidential value at all in relation to the matter to be decided by the board, namely whether the respondent had erred in 2009 when exercising its discretion in not requiring a TIA report at the relevant time (see para 40).

(5) It was the appellant who came to the board and who desired the board to give judgment in its favour by overturning the respondent's decision. It was also the appellant who asserted that the respondent had erred in deciding to grant the amendment application. Thus, s 101 of the Evidence Act 1950 places the burden of proof on the appellant to satisfy the board that its appeal deserves to succeed (see para 45).

(6) No adverse inference should be drawn in the circumstances of this case because: (i) the burden of proof was on the appellant; (ii) there was no conscious withholding or suppression of evidence; (iii) the appellant was at liberty to call the witnesses to give evidence; (iv) it was not shown that the evidence claimed to have been withheld or suppressed was consistent with facts already proved (see para 53).

(7) The TIAR objection also could not succeed because of the doctrine of estoppel. The appellant's lack of urgency and expedition in the prosecution of its appeal (with repeated requests for adjournments), coupled with its failure or refusal to seek a stay of implementation of the planning permission given, made it inequitable to allow the appellant to succeed on the sole ground of the TIAR objection, which issue was to a large extent a technical one (see paras 54 & 56).

[Bahasa Malaysia summary

Responden pada 5 Disember 20065 telah membenarkan kebenaran merancang ('KM asal') untuk Hunza Properties (Penang) Sdn Bhd ('pemohon KM') untuk menjalankan satu pembangunan kondominium, lot-lot komersial dan lot-lot pejabat. Semasa pembangunan, pemohon KM pada 5 Januari 2009 memohon kepada responden untuk beberapa pindaan kepada KM asal ('permohonan pindaan'). Permohonan pindaan dibenarkan oleh responden pada 16 Disember 2009 ('KM pindaan'). Perbezaan di antara KM asal dan KM pindaan hanya berhubung perubahan kecil sebanyak 5% gabungan ruang komersial/pejabat. Bantahan perayu terhadap permohonan pindaan ditolak

oleh responden yang membenarkan pindaan KM dan oleh itu rayuan ini dibuat. Bantahan-bantahan perayu adalah berdasarkan beberapa alasan. Sebagai tambahan, perayu juga menimbulkan kebimbangan berbanding bantahan iaitu bahawa saiz projek akan meningkatkan kesesakan trafik, isu-isu memarkir dan kerosakan lanjutan jalan-jalan berdekatan. Dalam memperoleh KM asal, pemohon KM telah menghantar satu kajian-mikro Laporan Penilaian Kesan Trafik yang disediakan pada 2006 ('Laporan PKT 2006') dan responden berpuas hati dengan penilaian-penilaian yang dibuat dalam Laporan PKT 2006. Apabila permohonan pindaan kemudiannya dikemukakan pada 2009, responden berpendapat bahawa disebabkan perubahan yang dicadangkan adalah tidak penting, tiada laporan PKT yang baru diperlukan. Semasa pendengaran, perayu mengabaikan semua alasan rayuan dan bergantung semata-mata atas alasan bahawa apabila mempertimbangkan dan membenarkan permohonan pindaan, responden tersilap kerana bergantung pada Laporan PKT 2006 memandangkan ia seharusnya memohon untuk laporan PKT terbaru ('bantahan PKT'). Perayu kemudiannya menender laporan PKTnya yang disediakan pada 2011 ('Laporan PKT perayu'). Beberapa penangguhan pendengaran rayuan dipohon oleh perayu, yang tidak menunjukkan kesegeraan atau kepentingan dalam pendakwaan rayuannya. Perayu juga memilih untuk tidak memohon satu penangguhan perlaksanaan pindaan KM. Isu-isu yang timbul yang perlu dipertimbangkan oleh lembaga adalah: (i) sama ada bantahan laporan PKT merupakan satu alasan baru yang boleh dikemukakan pada perbicaraan; (ii) sama ada responden tersilap kerana tidak mendapatkan laporan PKT bagi tujuan pertimbangan permohonan pindaan; (iii) sama ada laporan PKT perayu merupakan satu keterangan baru yang tidak boleh dibenarkan berdasarkan prinsip di dalam *Ladd v Marshall* [1954] 3 All ER 745 (*Ladd v Marshall*); (iv) sama ada responden (pihak berkuasa perancang tempatan) mempunyai beban untuk membuktikan bahawa keputusannya adalah tepat dan dibuat secara munasabah; dan (v) sama ada memandangkan responden sendiri tidak memanggil mana-mana saksi, s 114(g) Akta Keterangan 1950 perlu digunakan terhadap responden.

Diputuskan, mengetepikan rayuan dan mengesahkan keputusan responden:

(1) Pihak lembaga tidak dikecualikan daripada menerima dan mempertimbangkan, sekiranya difikirkan perlu, satu alasan baru yang dikemukakan hanya pada pendengaran. Tetapi sama ada ia akan berbuat sedemikian atau tidak bergantung kepada fakta-fakta dan keadaan setiap kes. Bantahan PKT tidak dikemukakan hanya pada hari terakhir pendengaran. Ia dikemukakan beberapa bulan sebelumnya. Responden dan pemohon KM mempunyai peluang mencukupi untuk menjawab bantahan PKT. Oleh itu, alasan baru (bantahan PKT) boleh dikemukakan oleh perayu (lihat perenggan 24 & 26).

(2) Responden tidak tersilap, atau membuat satu keputusan tidak

munasabah, dengan tidak mendapatkan satu laporan PKT apabila ia dibentangkan untuk membincangkan dan memutuskan sama ada untuk membenarkan permohonan pindaan. Satu laporan PKT hanya diperlukan di mana permohonan pada ketika itu, sekiranya dibenarkan, akan membawa peningkatan besar dalam populasi atau jumlah trafik di tempat berkenaan. Tidak seperti permohonan untuk KM asal yang mana selepas diluluskan, akan mengakibatkan peningkatan besar dalam ruang perumahan, komersial dan pejabat baru (dan dengan itu satu peningkatan besar dalam jumlah trafik), permohonan pindaan hanya berhubung satu perubahan kecil 5% gabungan ruang komersial/pejabat. Dalam keadaan ini, tidak salah untuk responden berpendapat bahawa tiada laporan PKT diperlukan untuk menyokong perubahan yang agak kecil. Responden tidak melakukan sebarang kesilapan seperti *Wednesbury* (lihat perenggan 37).

(3) Tiada bantahan dikemukakan semasa pendengaran apabila laporan PKT diperkenalkan. Kedua-dua responden dan pemohon KM meneruskan untuk membuat pemeriksaan balas pembuat Laporan PKT dengan panjang lebar. Prinsip dalam kes *Ladd v Marshall* terpakai hanya kepada satu proses rayuan kehakiman (berlawanan dengan prosiding kehakiman pada peringkat pertama). Walaupun prosiding di hadapan lembaga disebut satu 'rayuan', dan seseorang yang memulakan atau mengemukakan prosiding tersebut dipanggil sebagai seorang 'perayu', sebenarnya prosiding di hadapan lembaga merupakan prosiding pertama kehakiman atau separa kehakiman. Satu prosiding di hadapan lembaga oleh itu bukan merupakan satu 'rayuan' dalam erti kata *Ladd v Marshall* (lihat perenggan 38).

(4) Laporan PKT perayu, walaupun tidak dikecualikan oleh prinsip di dalam *Ladd v Marshall*, mempunyai sedikit atau tidak mempunyai nilai keterangan sama sekali berhubung perkara yang perlu diputuskan oleh lembaga, sama ada responden tersilap pada 2009 semasa melaksanakan pertimbangannya dengan tidak mendapatkan laporan PKT pada masa relevan (lihat perenggan 40).

(5) Perayu telah berjumpa dengan pihak lembaga dan meminta mereka untuk memberikan penghakiman bagi pihaknya dengan mengetepikan keputusan responden. Perayu juga menegaskan bahawa responden tersilap dalam memutuskan untuk memberikan permohonan pindaan. Oleh itu, s 101 Akta Keterangan 1950 meletakkan beban bukti ke atas perayu untuk memuaskan lembaga bahawa rayuannya berhak untuk berjaya (lihat perenggan 45).

(6) Tiada anggapan berlawanan perlu diandaikan dalam keadaan kes ini kerana: (i) beban bukti adalah ke atas perayu; (ii) tiada penahanan atau sekatan keterangan secara sedar; (iii) perayu bebas untuk memanggil saksi-saksi untuk memberikan keterangan; (iv) tidak ditunjukkan

bahawa keterangan yang didakwa ditahan atau disekat konsisten dengan fakta-fakta yang telah dibuktikan (lihat perenggan 53).

(7) Bantahan PKT juga tidak boleh diterima disebabkan doktrin estopel. Perayu tidak bersegera dan mementingkan pendakwaan rayuannya (dengan beberapa permohonan untuk penangguhan), ditambah dengan kegagalan dan keengganannya untuk memohon satu penangguhan perlaksanaan kebenaran merancang diberikan, menjadikannya tidak ekuiti untuk membenarkan perayu untuk berjaya atas alasan bantahan PKT, di mana isu sebahagian besarnya adalah teknikal (lihat perenggan 54 & 56).]

Notes

For cases on Evidence Act 1950, s 114(g), see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 171–173.

For a case on application for planning permission, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) para 200.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680, CA (folld)

CEC v Comptroller of Income Tax [1971] 2 MLJ 43 (refd)

Doody v Secretary of State for the Home Department; and another appeal [1993] 3 All ER 92, HL (refd)

Grassland Plantation Inc v Frizz-King Enterprises LLC No.117 September Term, 2008, CA (refd)

International Times v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)

Krishnan Nambiar s/o Perabakaran & Ors v Dr P Mahendran & Anor [2009] 4 MLJ 267, HC (refd)

Ladd v Marshall [1954] 3 All ER 745, CA (refd)

Lai Yoke Ngan v Chin Teck Kwee & Anor [1997] 2 MLJ 565, FC (refd)

Nikmat Jasa Piling Sdn Bhd v Teng Tong Kee [1998] MLJU 490; [1998] 3 CLJ 367, HC (refd)

R (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council [2010] 4 All ER 931, SC (refd)

Legislation referred to

Evidence Act 1950 ss 101, 101(2) 103, 114(g)
Government Proceedings Act 1956 s 29
Interpretation Acts 1948 and 1967 s 17A
Land Acquisition Act 1960 s 38(1), (2)
Specific Relief Act 1950 s 54
Town and Country Planning Act 1976 s 21(6)

Ung Chirt Kye for the appellant.
Shamiah (Lim Chooi Ping and Latiff Khalid with her) for the respondent.

Lim Mook San (Ong Wee En with him) for the KM applicant.

Yeo Yang Poh Ch:

THE BACKGROUND FACTS

[1] Hunza Properties (Penang) Sdn Bhd ('the KM applicant') wanted to carry out a development of condominiums, commercial lots and office lots, on several plots of land along Persiaran Gurney, next to the Regency and the G Hotel. The respondent granted planning permission for the same, on 5 December 2006 ('the original KM'). The KM applicant names its project 'the Gurney Paragon'. Before this board, there is no challenge to the grant of the original KM, or to its validity.

[2] In thecourse of the development, however, the KM applicant later (on 5 January 2009) made an application to the respondent for some amendments to the original KM ('the amendment application'). The amendment application was granted by the respondent on 16 December 2009 ('the amended KM'). The difference between the original KM and the amended KM is explained below.

[3] The original KM was granted for the development of:

(a) two 43-storey blocks of condominiums totaling 240 units, with a commercial podium, and a 2-level basement car park; and

(b) a 37-storey building comprising 31 storeys of office space (with a commercial podium), a 6-level car park, and a 2-level basement car park.

Whereas the amended KM was approved for the following variations:

(c) two 43-storey blocks of condominiums totaling 220 units, with a 3-storey commercial podium, and a 2-level basement car park; and

(d) a 28-storey building comprising 20 storeys of office space (with a commercial podium), an 8-level car park, and a 3-level basement car park.

[4] The changes that are relevant for the purpose of this appeal are:

(a) a decrease of 20 units of condominiums;

(b) an increase of around 477,351 sqft of commercial space (from about 458,000 sqft to about 935,351 sqft);

(c) a decrease of around 425,000 sqft of office space (from about 525,000 sqft to about 100,000 sqft); and

(d) an overall increase of around 52,351 sqft of combined commercial/office space (from 983,000 sqft to 1,035,351 sqft). It works out to be about a 5% increase.

[5] The appellant lodged objections against the amendment application. Their objections were rejected. The respondent granted the amended KM; and hence this appeal. For completeness of record, it should be noted that the present name of the appellant was only substituted after the commencement of the hearing. It is a technical matter that does not require elaboration, since the substitution was made without any objections from all other parties. In substance, the persons constituting the appellant were and are the same at all material times.

[6] The appellant stated in some detail its grounds of objection, in a 2-page document that accompanied its notice of appeal — see pp 2–3 of the *rekod rayuan* ('RR'). Those grounds basically concerned the following matters:

(a) the appellant wanted compensation from the KM applicant, because (according to the appellant) the KM applicant had proceeded with the amended development (almost to completion) even before the same was approved;

(b) fear of increased structural damage to the appellant's condominiums, in addition to what had already been caused, as a result of the amended development;

(c) construction of basement car parks by the KM applicant would cause damage (or further damage), and pose safety issues. The KM applicant should be required to build multi-level car parks (above ground), instead of basement car parks; and

(d) noise pollution resulting from construction works.

[7] After setting out its grounds of objection (as summarised above), the appellant stated the following:

> In addition to the above objections …, we would also like to mention the following concerns for your consideration:
>
> …
>
> (5) Due to the size of the Hunza Paragon project, it is inevitable that traffic jams and traffic congestion will significantly increase together with parkingissues and further deterioration of the neighbouring roads. We urge you to seek advice from the state government to improve the infrastructure of the immediate area and propose roads and traffic solutions before the completion of the projects.

[8] For convenience of reference, I shall call the appellant's concern recited in para 7 above 'the traffic concern'. I note the following about the traffic concern: A

(a) the appellant chose to put it forward as a concern rather than an objection. The appellant urged that mitigation measures be taken to address that concern, rather than objecting to the project (or the amendments) itself; and B

(b) the appellant had ventilated the traffic concern as being due to the size of the project itself, and not because of the amendments or alterations to the project pursuant to the amended KM. C

[9] I will return to discuss the significance of the nature and scope of the traffic concern (see paras 21–27 below).

[10] In the procurement of the original KM, the KM applicant had submitted a number of studies and reports. Among them were the following: D

(a) a micro-study traffic impact assessment report prepared in 2006 ('the 2006 TIA Report'). This report pertained to a study of the immediate vicinity; and E

(b) a macro-study TIA Report prepared in 2007 ('the 2007 TIA Report'). This study concerned a larger area. It was submitted to persuade the respondent to allow an increase in plot ratio (from 4:1 to 5:1), which the respondent declined to do. F

[11] In approving the project by way of the original KM, the respondent was satisfied with the assessments made in the 2006 TIA Report and in the other relevant documents.The respondent was not persuaded by the 2007 TIA Report to increase the plot ratio. When later the amendment application was submitted in 2009, the respondent took the view that, because the proposed changes were non-substantial, no fresh TIA report was needed to be furnished. This was stated in a letter of the respondent dated 25 June 2009. This decision of not requiring a fresh TIA report, as we shall see, eventually becomes the sole point of attack by the appellant regarding the grant of the amended KM by the respondent. G H

THE APPELLANT'S CONDUCT OF ITS APPEAL

[12] This appeal was first fixed for hearing on 23 June 2010 (a date agreed to by all parties during case management earlier). On that day, the respondent and the KM applicant were ready to proceed. But the appellant sought an adjournment, because its counsel was engaged elsewhere that day. The hearing was adjourned to 19 August 2010. I

[13] On 19 August 2010, both the respondent and the KM applicant were again ready to go on. But the appellant's counsel sought another adjournment. He informed the board that the appellant was having its annual general meeting later that month, which meeting would decide whether or not the appellant wished to continue with the appeal. The respondent had no objections to the request for adjournment, but the KM applicant objected to it because the matter had been hanging over their heads for a considerable period of time. On that day, the appellant informed the board that its objections revolved around the KM applicant's piling works and the damage it had caused or might cause to the appellant's condominiums. The impression given on that day was that there was a good likelihood that the appeal might be withdrawn, since the structural damage had been rectified, and the question of any monetary loss or compensation would be a matter for the courts and not for this board. Despite the KM applicant's objection, the board gave indulgence to the appellant by not proceeding with the hearing of the appeal on that day. The board granted a second adjournment, and ordered costs of the day to be paid by the appellant. The hearing was adjourned to 15 December 2010.

[14] On 15 December 2010, the appellant did not withdraw the appeal. So the hearing commenced. The appellant began by putting forward its grounds of objection concerning the dangers posed by the piling works being carried out by the KM applicant. However, when it was pointed out to the appellant that all piling works had by then already been completed (by reason of the lapse of time in view of the two adjournments sought and obtained by the appellant), the appellant quickly abandoned those grounds. The appellant asked that the hearing be stood down for a while. After a short recess, the appellant returned to inform the board that it no longer wished to pursue the issues concerning piling and structural works, and switched its focus to the traffic issue instead. The appellant abandoned all its grounds of appeal outlined in para 6 above. The appellant turned to another issue.

[15] The appellant's new found ground of objection is simply that, when considering and approving the amendment application, the respondent was wrong to have relied on the 2006 TIA Report and/or the 2007 TIA Report, when it ought to have asked for an updated TIA report. For ease of reference, I shall call this ground of objection 'the TIAR Objection' (which by then had become the appellant's sole ground of objection). The appellant proceeded to argue its appeal based on the TIAR objection, but soon realised that it had come with nothing to challenge the 2006 and 2007 TIA Reports. The appellant then requested yet another adjournment, in order for it to adduce further evidence. Notwithstanding the KM applicant's objection, the hearing was once more adjourned to 4 January 2011 (a date agreed to by the appellant), with an order of costs made.

[16] On 4 January 2011, however, the appellant was again not ready to proceed, because the person engaged by it to provide a TIA report needed more time to prepare the same. At the request of the appellant, the case was further adjourned to 13 April 2011, despite objections from the KM applicant.

[17] On 13 April 2011, the appellant tendered its TIA report that was prepared in 2011 ('the appellant's TIA report'). Its makers were cross-examined by the respondent and the KM applicant. Hearing of this appeal was finally completed on that day, with parties putting in written submissions subsequently, and a date for further clarification/submissions on 19 July 2011. The board then reserved its decision.

[18] It can be seen from the above narration of events that a number of adjournments of the hearing of this appeal were sought by the appellant, who did not display expedition or urgency in the prosecution of its appeal. At the same time, the appellant chose not to seek a stay of implementation of the amended KM, despite being aware that it could make applications for the same either at this board or in High Court. By choosing not to make any application for stay, the appellant had tacitly allowed the KM applicant to carry on with its construction works during all those times that the hearing of this appeal was delayed at the behest of the appellant.

SHOULD THE APPELLANT BE ALLOWED TO RAISE A NEW GROUND OF OBJECTION?

[19] Before considering the TIAR objection, I should deal with the question of whether this is a new ground raised at the hearing and, if so, whether an appellant can be permitted to advance new grounds during a hearing before this board.

[20] The KM applicant contended that the TIAR objection was a new basis of objection, because it was not one of the grounds stated in the appellant's notice of appeal. The respondent adopted a similar stance. On the other hand, the appellant argued that the TIAR objection was related to the traffic concern (defined in paras 7–8 above), which was mentioned in its notice of appeal, and which was therefore not new.

[21] It is worth remembering that both the substance and the manner of expression of the traffic concern indicated that it was put forward merely as a concern and not as an objection. The appellant had stated it as a concern that was expressed 'in addition to the above objections', and about which the appellant urged the respondent to 'seek advice from the state government to improve the infrastructure of the immediate area and propose roads and traffic solutions'. Hence, I think it is clear that the appellant did not, in its notice of

appeal, raise the traffic concern as an objection. The TIAR objection is therefore in truth a new ground of objection argued at the hearing. The question that follows is whether an appellant is absolutely prohibited from raising a new ground of objection before this board.

[22] Section 21(6) of the Town and Country Planning Act 1976 ('the Act') provides that the local planning authority has to notify owners of neighbouring lands of their right to object to an application for planning permission and their right to state their grounds of objection, within a period of time. It says no more than that a neighbouring landowner possesses those rights. It does not say that a person who has lodged an objection will be later precluded from raising or relying on any ground which he did not expressly and specifically state at the time of lodging his objection.

[23] I do not detect in s 21(6) any legislative intent that an objector shall be absolutely prohibited from raising relevant matters that were not specifically stated at the time of lodgment of objection. I say so for the following reasons:

(a) s 21(6) is an enabling provision, as opposed to a disabling provision, which confers rights on a class of persons;

(b) an enabling provision conferring rights may of course qualify the same by removing some of the rights in given circumstances. In order to do so, however, clear language must be used, short of which it should not invite a construction that rights are both conferred and partly removed in the same breath. As an illustration, a prohibitory intention that is derived from the use of clear language can be found in s 38(2) of the Land Acquisition Act 1960, which states that 'every application under subsection (1) shall state fully the grounds on which objection to the award is taken, and at any hearing in Court no other grounds shall be given in argument, without leave of the Court'. That would be how a legislative intention of prohibition is conveyed;

(c) the modern approach to the construction of statutes (spearheaded by Lord Hoffman since two decades ago) is the purposive approach. In Malaysia this is statutorily fortified, in that s 17A of the Interpretation Acts 1948 and 1967 provides as follows:

> 17A Regard to be had to the purpose of Act
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

(d) one of the purposes underlying the Act is to promote and ensure that planning decisions are made in an accountable manner, by taking into

consideration the views and interests of diverse parties, as well as public interest. A restrictive interpretation of s 21(6), by inferring from it an absolute prohibition of new grounds, would dilute rather than promote this purpose.

[24] Saying that no absolute prohibition is found in s 21(6), however, is not the same as saying that an appellant shall as of right be entitled to raise any new grounds during the hearing of an appeal before this board. What it means is that the board is not precluded from receiving and considering, if it thinks fit, a new ground that is raised only at the hearing. But whether or not it will do so (and what conclusion it may come to after so doing) is something that will depend on the facts and circumstances of each individual case.

[25] For instance, in situations where, by not raising a ground of objection from the outset, an appellant/objector had led a planning applicant to alter its position in such a way that it would seriously prejudice the planning applicant (especially in an irremediable manner) if the issue in respect of which the appellant had remained silent earlier is now considered and upheld for the first time, the equitable doctrine of estoppel will usually come to the aid of the planning applicant. Whether or not this is such a case is something that I shall later consider, after all the relevant facts and circumstances have been looked at.

[26] I am not persuaded by the KM applicant's argument (made in its written submissions) that allowing the appellant to canvass a new ground of appeal in this case would be 'a breach of natural justice' because the respondent and the KM applicant were 'caught off guard at the last hearing date'. Firstly, the TIAR objection was not raised only on the last day of hearing. It was raised months before that. Secondly, both the respondent and the KM applicant did have ample opportunity to answer the TIAR objection. If either or both of them had needed more time to prepare a response, they could have asked for a continuation of hearing, which would have been granted (bearing in mind that the appellant had earlier been granted similar adjournments for it to better prepare its case). Neither the KM applicant nor the respondent found the need to make such a request.

[27] This board, at the hearing of this appeal, had therefore ruled in favour of allowing a new ground (namely the TIAR objection) to be raised by the appellant. The board would, after hearing and considering the totality of the facts and circumstances, decide whether or not there are circumstances preventing this new objection from succeeding, in limine or otherwise. It will be at that stage that the equitable doctrine of estoppel will, among other things, be considered.

A THE REQUIREMENT OF SUBMISSION OF TIA REPORTS IN PLANNING APPLICATIONS

[28] It is not a specific statutory requirement that an applicant for planning permission must prepare and submit a traffic impact assessment (TIA) report for the local planning authority's consideration. There is also no statutory directions as to what types of application (or what circumstances) would require a TIA report, and what would not.

[29] Rather, the practice has evolved from a reasonable exercise of discretion by local planning authorities over the past years that, in cases where a substantial increase in population or traffic volume can be expected as a result of a proposed development, a TIA report would be required from an applicant for planning permission, in order to assist the planning authority to take into account (among other factors) the forecasted impact that the proposed development might have on the surrounding infrastructure.

[30] The following observations can be made about the requirement of TIA reports:

(a) it is not the kind of strict statutory requirement the breach of which would constitute a breach of statute. The appellant, too, does not so allege;

(b) it is a fitting and useful requirement by planning authorities, so long as their exercise of discretion in imposing the requirement is reasonable in the circumstances of the case concerned. Such exercise of discretion is challengeable by an applicant for planning permission;

(c) it will not be reasonable to impose this requirement in every case. It should only be imposed where the planning authority reasonably expects a substantial increase in population or traffic volume in that area as a result of the proposed development;

(d) in the absence of statutory guidelines, it boils down to a matter of discretion on the part of the planning authority as to when a TIA report may or may not be required, and the question of whether that discretion (if challenged) has been properly and reasonably exercised in any particular case;

(e) the requirement, when properly imposed, concerns a matter that a planning authority may and should rightly take into consideration. However, it is often not the only matter for consideration. It must be weighed along with all other relevant factors; and

(f) a TIA report is neither an exact science nor a crystal ball. It invariably involves a forecast, an educated prediction at best. The weight to be given

to such an assessment is a matter of discretion for the planning authority. Again, of course, the exercise of such discretion is challengeable before this board.

[31] The last observation is premised on high authority. In *R (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] 4 All ER 931 at 950j, the UK Supreme Court has this to say about material considerations in planning law generally (of which traffic impact is undoubtedly one):

> …, the question of what is a material (or relevant) consideration is a question of law, but the weight to be given to it is a matter for the decision-maker.

[32] In light of the foregoing, let us examine the following matters that had transpired in the present case:

(a) in relation to the application for the original KM, the respondent had required the KM applicant to submit a TIA report. In view of the substantial increase in traffic volume in the area that can reasonably be expected from the proposed development, this requirement imposed by the respondent was entirely proper and reasonable. The KM applicant duly complied with the same;

(b) later, the KM applicant submitted the 2007 TIA Report, in an unsuccessful attempt to persuade the respondent to allow a higher plot ratio for the development. A perusal of the 2007 TIA Report reveals that future improvements in infrastructure that were being planned at that time (namely the proposed Loop 5 system, PORR (Penang Outer Ring Road) and monorail projects, which together shall be referred to as 'the Planned Infrastructure') featured prominently in it, and played a significant role in the assessments and projections made in the report;

(c) in its submissions, the KM applicant tries to down play the significance of the planned infrastructure. The KM applicant contends that 'now here in the [TIA Report] was it stated that the report was dependent on PORR or monorail being implemented'. I think that is a gross understatement, and an unjustifiably economical interpretation of the contents of the report;

(d) the appellant, on the other hand, says that those reports were done 'on the wrong basis', because they were made on the 'assumption' that the planned infrastructure would become a reality, but that now we know that these projects are currently shelved. I do not see the logic in this criticism of the reports. Those TIA reports must be viewed in the circumstances prevailing in 2006–2007 (when they were submitted to and considered by the respondent). In those years it was certainly not

wrong or inappropriate for a traffic consultant to have taken into account the planned infrastructure, in the making of the relevant assessments and projections; and

(e) the real meat of the appellant's objection cannot be that those reports were wrong at the time they were made. Rather, it is that the reports could not later be used to support the amendment application in 2009, because by which time it was known that the planned infrastructure was shelved. The appellant contends that the respondent ought to have required the KM applicant to submit a fresh TIA report before considering and granting the amendment application. There is prima facie logic in this argument, even though it must also be appreciated that the 2006 and 2007 TIA reports contained more than just assessments based onproposed future infrastructure improvements. They also contained projections based on a 'do-nothing' scenario. It is equally noteworthy that the 2007 TIA report was prepared primarily to support an application by the KM applicant to increase the plot ratio from 4:1 to 5:1 (which was refused by the respondent). That requested increase of plot ratio, if it had been approved, would have substantially increased the size of the project.

[33] The respondent's answer to the appellant's argument is a straight forward one. The respondent pointed out that the 2006 and 2007 TIA reports were prepared in relation to the original KM. The application for the original KM was to develop and create not only two blocks of condominiums, but also 983,000 sqft of new commercial and office space in that area. A development of that size obviously warranted the commissioning of a TIA report.

[34] When it came to the amendment application, the same was (unsurprisingly) processed and treated by the respondent as anapplication merely to modify parts of the already approved development. Bearing in mind that the original KM had been granted and was in effect, the only matter for consideration by the respondent was the nature and extent of the proposed alterations to the development, and the additional or extra effect (if any) such alterations might have in planning terms. The respondent formed the opinion that the changes applied for were not substantial, since it involved a relatively small overall increase of around 52,351 sqft of combined commercial/office space, which represented a small fraction (about 5%) of the total combined commercial/office space that had already been approved. The percentage of overall increase would be even much smaller if one takes into account the approved condominium space as well. Consequently, the respondent did not find it necessary to require a fresh TIA report.

[35] The question for this Board to decide is not, as suggested by the appellant, whether it was correct for the respondent to have relied on the 2006

and 2007 TIA reports when deciding to grant the amendment application. That was not what the respondent did. What the respondent had decided in 2009 was that no TIA report was necessary for its deliberations as to whether to grant the amendment application, having formed the view that the proposed changes were not substantial in relation to the development already permitted under the original KM. Hence, the proper question for this Board to decide is whether or not the respondent had erred in not requiring a TIA report for the purpose of consideration of the amendment application.

[36] In other words, was that decision of the respondent properly and reasonably made? The *Wednesbury* reasonableness test, derived from the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680, may be applied. By this test, an administrative decision (of which the grant of planning permission by a local planning authority is one) may be considered unreasonable in the following circumstances:

(a) if it is made without taking into account all matters that are required to be taken into consideration;

(b) if it is made by taking into consideration matters that ought not to have been taken into account; and

(c) if it is so clearly absurd, wrong, unreasonable, unjustified or arbitrary, that no reasonable decision maker could have made it.

[37] I do not think the respondent had erred, or had made an unreasonable decision, in not requiringa TIA report when it set out to deliberate and decide whether to grant the amendment application. My reasons for saying so are as follows:

(a) a TIA report is only required where the application at hand, if approved, will bring about a substantial increase in population or traffic volume in the area concerned. In the present appeal, the application at hand was the amendment application (and not the application for the original KM). Unlike the application for the original KM which, once approved, would result in a substantial increase in new residential, commercial and office space (and thus a substantial increase in traffic volume), the amendment application concerned only a small variation of 5% of the combined commercial/office space. In the circumstances, it was not wrong for the respondent to have formed the opinion that no TIA report was necessary to support a relatively small alteration;

(b) it has not been shown that the respondent, in making that decision, had taken into account any matter that it ought not to have considered, or that it had failed to take into account any matter to which it ought to have

had regard. Neither is that decision one that no reasonable decision maker could have made. The respondent had not committed any error of the *Wednesbury* kind;

(c) in fact, the respondent quite rightly took into consideration the fact that the development was already approved under the original KM, and that the sole question for its decision, as far as the amendment application was concerned,was whether or not the requested alterations could be allowed. In deciding this issue, the fact that the proposed alteration was relatively small and non-substantial was a proper and reasonable factor to be considered by the respondent in coming to the conclusion that no TIA report was needed to support the application for amendment;

(d) while a change in circumstances regarding the planned infrastructure would have been relevant to a consideration of the application for the original KM; that was not what the respondent had to decide in 2009. The original KM stood. What the respondent had to decide in 2009 was to either approve or reject the proposed alterations to the development. The respondent was not reviewing the grant of the original KM; and

(e) the respondent did not overlook the traffic issue. It is evident that the respondent gave it ample consideration when dealing with the application for the original KM. But it was also not the only factor that the respondent took in account at the material time. The weight given to this factor in relation to others was a matter for the respondent: see *R (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] 4 All ER 931. Similarly, the weight to be given to the traffic consideration (among other material considerations) in relation to that relatively small alteration in 2009 was also a matter for the respondent. The appellant has not satisfied this board that the respondent had erred in the exercise of its discretion in this regard.

[38] The appellant did tender into evidence the appellant's TIA report, which is a micro-study report prepared in early 2011. In its written submissions, the KM applicant argues that this document cannot be admitted or relied upon because it is a piece of new or fresh evidence which should not be allowed in these proceedings. It refers to the oft-cited case of *Ladd v Marshall* [1954] 3 All ER 745. I think this argument is misplaced. Firstly, no objections were raised during the hearing, when the appellant's TIA report was introduced. Both the respondent and the KM applicant proceeded to cross-examine its makers at length. Secondly, the principle in *Ladd v Marshall* (and its underlying rationale) applies only to a judicial appellate process (as opposed to a judicial proceeding of first instance). Although a proceeding before this board is termed an 'appeal', and the person who initiates or brings about such proceeding is described as an 'appellant', in truth a proceeding before this board is a first-tier judicial or quasi-judicial proceeding (as opposed

to the processes that take place with the respondent, which are administrative in nature). A proceeding before this board is therefore not an 'appeal' in the *Ladd v Marshall* sense of the word.

[39] Next, the KM applicant says that it does not make sense, in the year 2011, for one to prepare a document that is to contain assessments, forecasts and predictions that were all supposed to have been made in the year 2009. The KM applicant points to the 'Study Objectives' stated in the appellant's TIA report, which declares that the report aims to 'analyse and evaluate the existing traffic condition' and 'forecast the future traffic generation'. 'Existing condition' in that context must mean the condition prevailing in the year 2011 (and not in the year 2009 when the respondent was dealing with the amendment application).

[40] In other words, the appellant's TIA report is not a document that could have been produced in 2009 to assist the respondent in any way. It therefore could have no relevance in relation to the function that was being performed by the respondent in 2009, with regard to the amendment application. I find much force in this argument. The appellant's TIA report, while not precluded by the principle in *Ladd v Marshall*, bears little or no evidential value at all in relation to the matter to be decided by this board, namely whether the respondent had erred in 2009 when exercising its discretion in not requiring a TIA report at the relevant time.

[41] Even if I were to assume that the appellant's TIA report, somehow, has some form of indirect and limited evidential value, I do not think it carries the appellant's case very far. I am not impressed with the findings stated in that report, and even less so with the testimonies of its makers at the hearing. For example:

(a) under cross-examination, the makers of the report (AW1 and AW2) showed surprising ignorance of the developments that had taken place (and that were taking place) since 2007 in the neighbourhood, such as the new wing of Gurney Plaza (completed and operating) and the 'Baby G' Hotel (pending completion);

(b) AW1, in particular, could not provide the basis of numerous findings and conclusions found in the appellant's TIA report, when he was cross-examined on the same. This does not instill confidence in the reliability or value of those findings and conclusions;

(c) AW2 admitted that, in the course of preparation of the report,he was specifically told by the appellant to draw the conclusions that later appear in the report. This throws into question the basic professional neutrality of the report; and

(d) when asked why it was that the report raised only traffic problems but did not contain any suggestion of possible solutions, AW1 replied that suggesting solutions was 'outside his job-scope', and that 'we were only looking at problems'! Again this casts doubt on whether the report is a balanced one.

[42] More importantly, we must not lose sight of the real issue that is to be determined by this board — which is whether in the first place it was wrong for the respondent to have decided to grant the amendment application without calling for a fresh TIA report. If it was not wrong for the respondent to have done so; then that is the end of the question. As explained earlier, the appellant has not managed to convince this board that the respondent had erred in not calling for a fresh report.

BURDEN OF PROOF IN AN APPEAL TO THE APPEAL BOARD

[43] The appellant then pulled out another strange prong of attack. It maintains that, in an appeal to this board, it is not an appellant who bears the burden of proving its case, but it is for a respondent (the local planning authority) to prove that its decision (that is being challenged) was indeed correctly and reasonably made. In other words, if the appellant is correct, it can simply sit back and require the respondent to prove to this board that the respondent had made a correct decision in granting the amendment application.

[44] I find this contention of the appellant to be contrary to both common sense and legal principles. The appellant seems to think that its contention is supported by s 101(2) read with s 103 of the Evidence Act 1950. I do not see how that is so. These provisions are set out below:

> 101 Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> …
>
> 103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[45] I do not see how the above provisions can support the appellant's position. In the present case, it is the appellant who comes to this board and

who desires this board to give judgment in its favour by overturning the respondent's decision. It is also the appellant who asserts that the respondent had erred in deciding to grant the amendment application. It is the appellant who wants this board to believe and to find that the respondent had committed an error. That being the case, s 101 of the Evidence Act places the burden of proof on the appellant to satisfy the board that its appeal deserves to succeed. The respondent did not initiate this appeal; it did not come to seek relief from this board.

[46] The same principle is stated in *International Times v Leong Ho Yuen* [1980] 2 MLJ 86, a case cited by the appellant itself. In that case the Federal Court affirmed that the 'burden of proof such as referred to in s 101 of the Evidence Act 1950 is the burden of establishing a case, and this rests throughout the trial on the party who asserts the affirmative of the issue'. In our situation, it is the appellant who has to establish the merit of its appeal. The issue that the appellant asserts in this appeal is the existence of an error allegedly committed by the respondent in 2009. Therefore, it is for the appellant to establish and prove the existence of that alleged error. The burden of proof must squarely be on the appellant throughout.

[47] No doubt the Federal Court in *International Times v Leong Ho Yuen* further explains that the onus of proof (as distinguished from the burden of proof) 'relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates'. Thus, while the burden of proof is on the appellant throughout, the onus of producing evidence may shift if (but only if) the appellant has already adduced sufficient evidence which, if uncontroverted by any evidence that the respondent or any other person may adduce, would entitle the appellant to succeed. That threshold has not been crossed by the appellant in our case.

[48] Quite clearly, therefore, the correct legal position is the opposite of what the appellant asserts. The burden of proof is on the appellant to satisfy this board that its appeal should succeed.

[49] The appellant did produce an American authority that, at first brush, appeared (at the hearing) to support the contrary view. It is the case of *Grasslands Plantation Inc v Frizz-King Enterprises LLC No 117* September Term, 2008, CA, a decision of the Maryland Court of Appeals in 2008 (the citation of which is unfortunately not provided by the appellant, beyond an 'internet reference' to 'No. 117, September Term, 2008'). The appellant refers to a passage in this case that seems to suggest that, on an appeal to a planning

appeals board, the burden of proof is on the planning authorities (the respondent) to justify its own earlier decision. The appellant invites a parallel to be drawn in the Malaysian context.

[50] Sadly, however, the industry of the appellant's learned counsel in locating this American authority is ill-matched by his analysis and submissionson the case. He completely failed to point out to the board that this American case dealt with the Maryland Code that contained provisions vastly different from the provisions in our Town and Country Planning Act 1976. The *Grasslands Plantation* case dealt with provisions in the Maryland Code that stipulated an 'anew nature' of the review process practised in the planning appeals board in Queen Anne's County, Maryland, where that board was statutorily required to conduct a de novo hearing on all issues pertaining to the planning application concerned. In the Maryland context, such an appeal is in the nature of a de novo hearing (as opposed to an appeal on the record). Thus, no parallel can be drawn from the *Grasslands Plantation* case, in the Malaysian context.

[51] This board is always grateful to counsel for bringing to its attention relevant laws and authorities. However, the unqualified citation of an authority from a foreign jurisdiction dealing with laws that are so vastly different from ours, without any caveat made from the outset, and leaving this Board to spend considerable time sieving through pages of a long judgment in order to ascertain for itself that the authority cited deals with vastly different situations, is not something that this board appreciates.

[52] In the parties' submissions, arguments were also put forward as to whether a proceeding before this board is adversarial or inquisitorial in nature. The view that I currently hold is that a proceeding before this board remains largely adversarial in nature, but with added power (given by statute) for the board to initiate an inquisitorial process by requiring the production of further evidence, documentary or oral. This 'hybrid' procedure appears to me to better serve the purposes of the Act. Because of the findings and conclusions that I have already come to above, it is not necessary in the instant appeal for me to further explore this issue and express a more considered view on it. I would prefer to leave that to a future occasion where the matter can be gone into in greater depth, assisted by fuller arguments from counsel.

[53] The appellant's counsel had also submitted that, because the respondent did not itself call any witness, s 114(g) of the Evidence Act 1950 should be invoked against the respondent. I do not think any adverse inference should be drawn in the circumstances, for the following reasons:

(a) the burden of proof is on the appellant, and not on the respondent. No

adverse inference should be made against a party who does not bear the responsibility of proof in the first place;

(b) a mere omission to call a witness is in itself insufficient for the proper invocation of s 114(g). There must be conscious withholding or suppression of evidence: see *Krishnan Nambiar s/o Perabakaran & Ors v Dr P Mahendran & Anor* [2009] 4 MLJ 267 at p 273. Such is not the case here;

(c) a party could not raise the presumption of adverse inference if he himself was at liberty to call the witness to give evidence (by subpoena if necessary), as a witness is not the property of any particular party: see *Krishnan Nambiar s/o Perabakaran & Ors v Dr P Mahendran & Anor* [2009] 4 MLJ 267 at p 274; and

(d) adverse inference will only be made if the evidence thought to have been withheld or suppressed is consistent with facts already proved: see *CEC v Comptroller of Income Tax* [1971] 2 MLJ 43 at p 58, followed in *Nikmat Jasa Piling Sdn Bhd v Teng Tong Kee* [1998] MLJU 490; [1998] 3 CLJ 367 at p 376. Such is not the case here.

THE OPERATION OF EQUITABLE ESTOPPEL

[54] Even if I had not come to the conclusion (or assuming I am wrong in coming to the conclusion) that the respondent did not err in not requiring a fresh TIA report in 2009 for the purposes of the amendment application, I would nevertheless still hold that the TIAR objection cannot succeed. This is because of the doctrine of estoppel.

[55] Through decades of legal development, the doctrine of estoppel has today become a useful tool for meeting the demands of justice and fairness. It has been said that the doctrine of estoppel is extremely flexible, and is 'a rule by which justice is done according to the facts and circumstances of a particular case'. In *Lai Yoke Ngan v Chin Teck Kwee* [1997] 2 MLJ 565 at p 583, the Federal Court said the following:

> … the doctrine (of estoppel) is essentially equitable in nature. It is a rule by which justice is done according to the facts and circumstances of a particular case and its operation depends much upon the conduct of the parties. It is therefore *extremely flexible in its application because it moulds itself to fit a particular fact pattern*. Accordingly, the categories of cases to which the doctrine applies are not closed. (Emphasis added.)

[56] The conduct of the appellant is therefore relevant, contrary to what the appellant would like us to believe when its counsel submitted that the board

should disregard the appellant's conduct. The appellant's lack of urgency and expedition in the prosecution of its appeal (with repeated requests for adjournments), coupled with its failure or refusal to seek a stay of implementation of the planning permission given, makes it inequitable (when all the facts and circumstances are considered in its totality) to allow the appellant to succeed on the sole ground of the TIAR objection, which issue is to a large extent a technical one. The appellant's lackluster conduct of its appeal has already been canvassed in some detail (see paras 12–18 above), and need not be repeated here.

[57] The envisaged inequity that I speak of is rather obvious. If in the circumstances of this case the appellant's objection is now allowed, when construction works have proceeded to an advanced stage with the appellant's acquiescence, it will entail the KM applicant making substantial alterations to parts of the buildings, not to mention the considerable costs that will be incurred or wasted, the prolonged period of construction, and the potential liabilities towards third parties that the KM applicant might incur.

[58] And if all those misfortunes were to be fall the KM applicant, how will the appellant benefit, apart from the satisfaction of winning a case, and of teaching the KM applicant an expensive lesson? For even if the appellant should succeed in this appeal, the Gurney Paragon will still be up, and in the near future will be occupied and operational, taking the form permitted under the original KM. Any difference that this might make to the traffic condition in the area will remain a matter of speculation (in the understandable absence of a 'control scenario'). But in all likelihood, the difference will be marginal, though the precise extent of which will be factually unascertainable.

[59] Could it be that the elephant in the room is the bad blood that continues to exist because at an earlier stage of construction (during piling works) the KM applicant did cause physical damage to the appellant's building structures, and thereby had incurred the appellant's wrath? Could that be the reason why the appellant continues to vigorously pursue this appeal, despite rectification of those earlier physical damage, and notwithstanding that its proper recourse for damages (if any) lies with the courts?

[60] I have not overlooked the appellant's argument that it should not be faulted for not applying to the court for an injunction, in view of s 29 of the Government Proceedings Act 1956 and s 54 of the Specific Relief Act 1950. It is not necessary, for our present purposes, to examine whether these provisions indeed apply to a local planning authority such as the respondent (though I have my doubts), because the appellant is unable to provide any good explanation as to why it failed or refused to pursue other available avenues, such

as making an application to this board (pursuant to r 17 of the Rules of the Appeal Board) to stay the execution or implementation of the amended KM.

[61] The fact suggests that the appellant was content to see the KM applicant proceed with construction (something the KM applicant was entitled to do, unless prevented by an order of this board or of the court), while at the same time not moving with reasonable speed with regard to the pursuit of its appeal before the board. By its own action and inaction, the appellant has created a situation where, short of the existence of some serious wrong or error (of which there is none in our case), it will be unfair to compel the KM applicant to revert to its original KM.

[62] Fairness is of course as important in planning cases as it is in cases involving other areas of law. In *Doody v Secretary of State for the Home Department; and another appeal* [1993] 3 All ER 92 at p 106d–h, a case referred to by the appellant itself, Lord Mustill had ponderously asked:

> What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken ….

[63] The same question and the same concerns have featured in the board's mind throughout the hearing and its deliberations. The answer that we have come to is that, in all the circumstances of this case, it will not be fair if this appeal is allowed.

THE CONCLUSION

[64] For the various reasons explained, this appeal is dismissed, and the respondent's decision of 16 December 2009 is affirmed. No order is made as to costs for the appeal, but the earlier orders of costs of the day (for adjournments) do stand.

[65] This is the unanimous decision of the board.

Appeal dismissed and respondent's decision affirmed.

Reported by Kanesh Sundrum